No. 98-237

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERTSON, STEPHENS & COMPANY,

Petitioner,

—v.—

TONYJA DUFFIELD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF ON BEHALF OF THE SECURITIES INDUSTRY ASSOCIATION AS AN *AMICUS CURIAE* IN SUPPORT OF PETITION

STUART J. KASWELL
FREDDA L. PLESSER
SECURITIES INDUSTRY
ASSOCIATION
120 Broadway
New York, New York 10271
(212) 608-1500

GARY SINISCALCO
Counsel of Record
LISA K. MCCLELLAND
ORRICK, HERRINGTON
& SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

Counsel for Securities Industry Association

MOTION FOR LEAVE TO FILE

The Securities Industry Association ("SIA") moves this Court to allow filing of this *amicus curiae* brief.

The SIA files this *amicus curiae* brief with the consent of the parties. Due to an oversight, the SIA is filing this brief two days beyond the deadline for filing of *amicus curiae* briefs in support of the petition for a writ of *certiorari*. The SIA, therefore, respectfully requests that this Court grant this motion for leave to file out of time.

October 6, 1998

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

Gary R. Siniscalco (GRS)

Gary R. Siniscalco
Counsel of Record
Lisa K. McClelland
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

Stuart J. Kaswell
Senior Vice President and General Counsel
Fredda L. Plesser
Vice President and Associate General Counsel
Securities Industry Association
120 Broadway
New York, New York 10271
(212) 608-1500

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. STATEMENT OF INTEREST 1

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT 5

I. BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *GILMER*, FURTHER GUIDANCE FROM THIS COURT IS NEEDED. 5

A. *Gilmer* Unequivocally Enforced Agreements to Arbitrate Statutory Discrimination Claims. 5

B. The Ninth Circuit's Strained Construction of the 1991 Civil Rights Act Conflicts with *Gilmer*. 7

II. THE SPLIT IN THE CIRCUITS IS UNTENABLE FOR EMPLOYERS AND EMPLOYEES RESOLVING DISPUTES. 10

A. The Ninth Circuit's Duffield Decision Conflicts with Every Other Circuit That Has Considered the Issue. 10

B. Because a Conflict in the Circuits Results in Inconsistent Employment Policies and Hampers the Quick and Efficient Resolution of Employment Disputes, a Writ of *Certiorari* Should Issue. 13

IV. CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

Cases:

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 432 (1996) 12

Cole v. Burns Inter. Sec. Svces., 105 F.3d 1465, 1472-73 (D.C. Cir. 1997) 11

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (1997) 3, 6, 8, 9 18

Faragher v. City of Boca Raton, ___ U.S. ___, 118 S.Ct. 2275, 1998 WL 336322 (June 26, 1998) 9

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 3, 5, 6, 7

Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) 10

Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995) 11

Mouton v. Metropolitan Life Ins. Co., ___ F.3d ___, 1998 WL 396827 (5th Cir. July 31, 1998) 4, 12, 13

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 10

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 11

TABLE OF AUTHORITIES

PAGE

Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998) 4, 12

Statutes:

1991 Civil Rights Act, Pub. L. 102-166 .....7, 8

42 U.S.C. § 1981 8

Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq* 7

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq* 3

Other Authorities:

Administrative Office of the United States, *Judicial Business of the United States Courts 1997* at Table C-2 16

Peter Truell, *Big Board Votes to Abandon Mandatory Job-Bias Arbitration*, N.Y. Times, September 4, 1998, at C8 2

SEC Opens Courtroom Door to Bias Suits; NASD Proposal to End Arbitration Rule OKd, Chicago Trib., June 24, 1998, at B2 2

TABLE OF AUTHORITIES

PAGE

Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims* 72 N.Y.U. L. Rev. 1344, 1349 (1997 17

Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, *Preliminary Draft Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts* n.82 (1997) 16

Standard & Poors Security Dealers of North America (1998) 16

Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?* 15 Thomas M. Cooley L. Rev. 1, 8 (1998) 17

U.S. General Accounting Office, *Alternative Dispute Resolution: Employers Experiences with ADR in the Workplace*, GAO/GGD-97-157 at 2 (1997) 15, 17

U.S. General Accounting Office, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes,* GAO/HEHS-94-17 at 3 (1994) 13

U.S. General Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS-95-150 at 7 (1995) 14

I. STATEMENT OF INTEREST[1]

The SIA brings together the shared interests of more than 800 securities firms throughout North America. SIA members – including investment banks, broker-dealers, specialists, and mutual fund companies – are active in all markets and in all phases of corporate and public finance. SIA member firms employ 380,000 individuals in the United States and account for $270 billion of revenues in our nation's economy. They manage the accounts of more than 50 million investors directly and tens of millions of investors indirectly through corporate thrift and pension plans.

Many SIA member firms utilize arbitration to resolve a broad range of disputes. Some firms require employees, as a condition of their employment, to register with a self-regulatory organization whose rules require

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[1] This *amicus curiae* brief in support of the petition for writ of *certiorari* was funded solely by the SIA and authored entirely by counsel for the SIA.

arbitration of some or all employment claims.[2] Other SIA member firms enter into private, pre-dispute arbitration agreements with employees, whereby those employees agree to arbitrate such disputes.

In the securities industry, employment claims are almost always intertwined with performance issues that may have regulatory significance. For these reasons, arbitration of statutory employment claims is an important part of how SIA's members conduct business.

The SIA is familiar with the questions involved in this case and believes that it would be helpful to the Court to file this *amicus curiae* brief in order to assist the Court in the resolution of this case.

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[2] Two of the largest self-regulatory organizations, the New York Stock Exchange, Inc. and the National Association of Securities Dealers, have recently proposed changing their rules to no longer require registered employees to arbitrate statutory employment discrimination claims. *See* Peter Truell, *Big Board Votes to Abandon Mandatory Job-Bias Arbitration*, N.Y. Times, September 4, 1998, at C8; *SEC Opens Courtroom Door to Bias Suits; NASD Proposal to End Arbitration Rule OK'd*, Chicago Trib., June 24, 1998, at B2.

II. SUMMARY OF ARGUMENT

The SIA respectfully submits that a writ of *certiorari* should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit below, reported at *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (1997), that rejects this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and directly conflicts with the decisions of each of the other circuit courts of appeals that has addressed this issue.

By holding that all arbitration agreements entered into as a condition of employment are unenforceable with respect to statutory discrimination claims arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and state anti-discrimination statutes, the Ninth Circuit effectively rejected *Gilmer*, wherein this Court upheld such agreements on facts similar to the instant case. Further guidance on *Gilmer* is necessary to prevent its erosion.

The Ninth Circuit's sweeping decision to preclude all such arbitration agreements – including private arbitration agreements and agreements entered into by employers in virtually every sector of our nation's economy – is in direct conflict with decisions by every other circuit court that has considered the issue, including recent decisions by the Third Circuit, *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998), and the Fifth Circuit, *Mouton v. Metropolitan Life Ins. Co.*, ___ F.3d ___, 1998 WL 396827 (5th Cir. July 31, 1998). This conflict between the circuits severely hampers employers from achieving any final resolution of employment disputes – especially those employers in the Ninth Circuit and employers with multi-state operations.

Because most SIA member firms employ individuals who have agreed to arbitrate all employment disputes, including statutory employment disputes, and because a large number of those firms operate in the Ninth Circuit and beyond, the SIA urges this Court to issue a writ

of *certiorari* to review the Ninth Circuit's decision and resolve the troubling inconsistencies and the practical problems that implementation of that this decision has raised.

III. ARGUMENT

I. BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *GILMER*, FURTHER GUIDANCE FROM THIS COURT IS NEEDED.

In 1991, this Court laid to rest the question of whether agreements to arbitrate, required as a condition of employment, were enforceable against statutory employment claims. *Gilmer*, 500 U.S. 20. Because the Ninth Circuit's opinion fails to follow *Gilmer*, a writ of *certiorari* should issue to review that decision.

A. *Gilmer* Unequivocally Enforced Agreements to Arbitrate Statutory Discrimination Claims.

Like Gilmer, Respondent Tonyja Duffield was required by her employer as a condition of employment to register with the New York Stock Exchange, Inc. ("NYSE"). By signing the "Uniform Application for Securities Industry

Registration or Transfer" ("Form U-4"), both Duffield and Gilmer "agree[d] to arbitrate any dispute claim or controversy" arising between the employee and his or her employer "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." *See Duffield*, 144 F.3d at 1185. Under the NYSE rules, "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative" must be arbitrated. NYSE Rules of Arbitration, R. 347.

Following the termination of his employment, Gilmer brought suit against his former employer in court for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* *Gilmer*, 500 U.S. at 24. Despite his arbitration agreement, Gilmer argued that he should not be compelled to arbitrate his claim because arbitration was inconsistent with the

purpose of the ADEA. *Id.* at 27. In rejecting Gilmer's argument, this Court found that, notwithstanding the "important social policies of the ADEA, there was no "inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims." *Id.* Although *Gilmer*'s language was unequivocal and this Court viewed the law of arbitration at that time it decided *Gilmer* to be clear, *id.* at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."), *Duffield* conflicts squarely with *Gilmer*.

B. The Ninth Circuit's Strained Construction of the 1991 Civil Rights Act Conflicts with *Gilmer*.

In an attempt to side-step *Gilmer*'s clear holding that mandatory, pre-dispute arbitration agreements may be enforced against statutory discrimination claims, the Ninth Circuit held that the text and legislative history of Section 118 of the 1991 Civil Rights Act, Pub. L. 102-166,

reprinted in notes to 42 U.S.C. § 1981, "evinced [Congress's] intention to preclude a waiver of judicial remedies for the statutory rights at issue." [3] *Duffield*, 144 F.3d at 1189 (quoting *Gilmer*, 500 U.S. at 26. Notwithstanding the fact that this Court decided *Gilmer* some six months prior to the passage of the 1991 Civil Rights Act,[4] the Ninth Circuit erroneously concluded that Congress intended to freeze its pre-*Gilmer* perception of the law that, according to the Ninth Circuit, "precluded Title VII cases from being subjected to compulsory arbitration." *Id.* at 1188 (quoting *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994)). This

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[3] Section 118 states:

> Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102-166, *reprinted in* notes to 42 U.S.C. § 1981.

[4] The Ninth Circuit erroneously stated that this Court's issuance of *Gilmer* was "almost simultaneous[]" with the passage of the 1991 Civil Rights Act. In fact, *Gilmer* was decided on May 13, 1991, and the 1991 Civil Rights Act was passed on November 7, 1991.

assertion is counter to the well-established rule of legislative construction that Congress is presumed to know and to adopt judicial interpretations of law existing at the time it enacts legislation. *See Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275, 1998 WL 336322 at * 11 (June 26, 1998) (presuming that Congress adopted judicial interpretations related to subject matter of 1991 Civil Rights Act unless Congress expressly modified those holdings). The Ninth Circuit's logic is nothing more than a thinly disguised end-run around this Court's holding in *Gilmer*: that mandatory, pre-dispute arbitration agreements may be enforced as to statutory discrimination claims.

The *Duffield* court's strained construction of the text of Section 118 further evidences *Duffield*'s conflict with *Gilmer*. According to the Ninth Circuit, Section 118's phrase "[w]here appropriate," means only when plaintiffs choose to go to arbitration, not when arbitration is "forc[ed] . . . upon them." *Duffield*, 144 F.3d at 1194. Thus, the Ninth

Circuit concluded, Congress only intended to "encourage[]" post-dispute agreements to arbitrate. *Id.* This plainly contradicts *Gilmer*'s earlier holding that a pre-dispute arbitration agreement, entered into as a condition of employment, was enforceable.[5]

II. THE SPLIT IN THE CIRCUITS IS UNTENABLE FOR EMPLOYERS AND EMPLOYEES RESOLVING DISPUTES.

The Ninth Circuit's *Duffield* decision presents a split in the circuits that the SIA urges this Court to resolve.

A. The Ninth Circuit's Duffield Decision Conflicts with Every Other Circuit That Has Considered the Issue.

Every other circuit court that has addressed this issue has disagreed with the Ninth Circuit's holding that the 1991 Civil Rights Act precludes mandatory, pre-dispute

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[5] The fact that Gilmer asserted an ADEA claim and Duffield asserts a claim under Title VII cannot be a basis for the Ninth Circuit's refusal to follow *Gilmer* since the ADEA and Title VII are similar statutory schemes. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992).

agreements to arbitrate statutory discrimination claims.

For example, in *Cole v. Burns Inter. Sec. Svces.*, 105 F.3d 1465, 1472-73 (D.C. Cir. 1997), the District of Columbia Circuit enforced a mandatory, pre-dispute agreement to arbitrate Title VII claims. The *Cole* court held that *Gilmer* required enforcement of arbitration agreements signed "as a condition of employment, to forego all access to jury trials and . . . to use arbitration in place of judicial for a for the resolution of statutory as well as contractual claims." The Eighth Circuit agreed that "the arbitrability of Title VII claims finds support in the Civil Rights Act of 1991." *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997). Similarly, in *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n.4 (7th Cir. 1995), the Seventh Circuit compelled an employee to arbitrate his ADEA claims pursuant to a mandatory, pre-dispute arbitration agreement, stating that "the Civil Rights Act of 1991 encourages the use of arbitration to resolve ADEA claims." *See also Austin v.*

Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 432 (1996) ("The language of [Section 118] could not be any more clear in showing Congressional favor towards arbitration.").

Finally, in two cases decided after *Duffield*, the Third Circuit and the Fifth Circuit compelled to arbitration employees' statutory claims pursuant to agreements to arbitrate contained in the employees' Form U-4. *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3rd Cir. 1998); *Mouton v. Metropolitan Life Ins. Co.*, ___ F.3d ___, 1998 WL 396827 (5th Cir. July 31, 1998). The *Seus* court sharply criticized the Ninth Circuit's analysis of the text and legislative history of Section 118, stating, "On its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration." *Id.* at 182. Noting *Duffield*'s conflict with *Gilmer*, the Third Circuit declared, "Finally, even if we were to accept 'authorized by law' as intended to

codify case law, we would find the text incompatible with the notion that the law codified was case law inconsistent with a Supreme Court case decided six months before the passage of the Act [referring to *Gilmer*]." *Id.* at 183. Similarly, the Fifth Circuit disagreed with *Duffield* in *Mouton,* 1998 WL 396827 at *2, n.4, holding that Title VII claims arising after the 1991 Civil Rights Act were arbitrable.

B. Because a Conflict in the Circuits Results in Inconsistent Employment Policies and Hampers the Quick and Efficient Resolution of Employment Disputes, a Writ of *Certiorari* Should Issue.

The conflict in the circuits caused by the *Duffield* decision will have an immediate and profound impact on the relationship between employers and employees. In the securities industry alone, some 32% of the employees of the largest 50 securities firms in the United States have agreed to arbitrate all claims arising out of their employment by virtue of signing a Form U-4. U.S. General Accounting Office, *Employment Discrimination: How*

Registered Representatives Fare in Discrimination Disputes, GAO/HEHS-94-17 at 3 (1994). Many of those firms require non-registered employees to sign individual arbitration agreements as a condition of employment. However, while this case arose in the context of the securities industry, the Ninth Circuit's sweeping opinion affects all employers who require employees, as a condition of employment, to agree to arbitrate their employment-related claims.

Since this Court's 1991 *Gilmer* decision, more and more employers have implemented arbitration programs. A 1994 General Accounting Office ("GAO") survey of private employers found that approximately 10% of employers utilize arbitration to resolve employment disputes. U.S. General Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS-95-150 at 7 (1995). By 1997, the GAO estimated that the figure had almost doubled to 19%. U.S. General Accounting Office,

Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace, GAO/GGD-97-157 at 2 (1997) ("*ADR in the Workplace*"). Further, employers report that they adopted arbitration as a means of coping with problems inherent in litigating employment disputes – time, cost and frustration. *Id.* at 7-8. Therefore, unless this Court issues a writ of *certiorari* to review the *Duffield* decision, employers and employees in the Ninth Circuit will remain unable to reap the benefits produced by arbitration, including reduced legal fees, shorter time to final resolution of disputes and the ability to resolve disputes while repairing or maintaining employment relationships. *Id.*

Further, *Duffield*'s broad rejection of arbitration of statutory employment disputes will dramatically increase the number of these claims that are brought in court. This will further burden a court system currently facing a crushing caseload of employment claims. For example, the Administrative Office of the United States

Courts estimates that the number of employment cases filed annual in the federal courts increased approximately 55% from 1992 to 1997. Administrative Office of the United States, *Judicial Business of the United States Courts 1997* at Table C-2. In the Second Circuit alone, employment discrimination matters comprise 10% of the total caseload. Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, *Preliminary Draft Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts* n.82 (1997). To force all such claims into litigation is a waste of judicial resources.

Unfortunately, the Ninth Circuit's decision doesn't just affect local and regional employers. Employers with multistate operations are likely to be the hardest hit. In the securities industry alone, more than 100 firms with offices within the Ninth Circuit also have offices within other circuits. *See Standard & Poor's Security Dealers of North America* (1998). Some of the largest firms have offices in

virtually every state. These firms, like other national employers, are faced with the dilemma of dismantling a system of dispute resolution that is cost-effective and efficient for employers and employees alike, or exempting those individuals who are employed within the Ninth Circuit. Neither alternative is appealing since, as the GAO's survey of alternative dispute resolution systems shows, most private-sector employers implement arbitration programs organizationwide. *ADR in the Workplace* at 2. Indeed, at least one scholar has posited that employers will only benefit from arbitration systems when *all* claims are required to be arbitrated – and that requires a system of mandatory, pre-dispute arbitration. Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?* 15 Thomas M. Cooley L. Rev. 1, 8 (1998). *See also* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims* 72 N.Y.U. L. Rev. 1344, 1349 (1997) ("[Pre-dispute

arbitration] is an alternative that offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy.").

Finally, both local and regional employers as well as national employers will suffer from *Duffield*'s effect on cases involving multiple claims. According to the Ninth Circuit, neither Title VII claims nor claims arising out of state anti-discrimination statutes may be subject to arbitration. *Duffield*, 144 F.3d at 1203. However, it is the rare case that only posits one theory of relief. Indeed, Duffield herself asserted state tort and contract claims that are subject to arbitration and Title VII and state anti-discrimination claims, which the Ninth Circuit deemed non-arbitrable. This means that employers and employees frequently will litigate employment claims in separate fora, even though those claims are based on the same set of factual circumstances – resulting in a waste of judicial resources.

IV. CONCLUSION

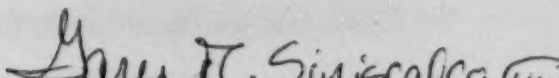
Abraham Lincoln is oft quoted as saying, "Discourage litigation . . . the nominal winner is often a real loser in fees, in expenses, and waste of time." Nonetheless, the Ninth Circuit has eschewed decisions of this Court and decisions of the other circuit courts of appeal to mandate that employers and employees resolve their statutory employment disputes through litigation. Because the *Duffield* decision has cast doubt on the continuing viability of *Gilmer* and has created an untenable dual-track for resolution of employment disputes, *amicus curiae* the Securities Industry Association

urges this Court to issue a writ of *certiorari* to review the decision below.

October 6, 1998

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP



Gary R. Siniscalco
Counsel of Record
Lisa K. McClelland
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

Stuart J. Kaswell
Senior Vice President and General Counsel
Fredda L. Plesser
Vice President and Associate General Counsel
Securities Industry Association
120 Broadway
New York, New York 10271
(212) 608-1500